

Thursday, 20 March 1947

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INTERNATIONAL MILITARY TRIBUNAL  
FOR THE FAR EAST  
Chambers of the Tribunal  
War Ministry Building  
Tokyo, Japan

PROCEEDINGS IN CHAMBERS

On

Paper No. 745 - Application of the Accused  
ITAGAKI, OKAWA, MINAMI, UMEZU and HOSHINO, for  
the production of witnesses under the Charter.

Request by defense for recess.

Before:

HON. SIR WILLIAM WEBB,  
President of the Tribunal and  
Member from the Commonwealth  
of Australia.

Reported by:

Sam Goldberg  
Philip Kapleau  
Court Reporters,  
IMTFE

## Appearances:

FOR THE PROSECUTION SECTION:

MR. A. S. COMYNS CARR, Associate Counsel,  
acting on behalf of the United Kingdom  
of Great Britain and Northern Ireland.

MR. SOLIS HORWITZ

MR. ARTHUR A. SANDUSKY

MR. DAVID N. SUTTON

MR. FRANK S. TAVENNER, Jr.

FOR THE DEFENSE SECTION:

MR. B. B. BLAKINLY, Counsel for the  
Accused TOGO, Shigenori and UMEZU,  
Yoshihiro.

MR. A. W. BROOKS, Counsel for the  
Accused OKAWA, Shumei

MR. ROGER F. COLE, Counsel for the  
Accused MUTO, Akira.

MR. OWEN CUNNINGHAM, Counsel for the  
Accused OSHIMA, Hiroshi.

MR. GEORGE A. FURNESS, Counsel for the  
Accused SHIGEMITSU, Mamoru.

MR. MICHAEL LEVIN, Counsel for the  
Accused SUZUKI, Teiichi.

MR. FLOYD J. MATTICE, Counsel for the  
Accused MATSUI, Iwane

MR. SAMUEL A. ROBERTS, Counsel for the  
Accused OKA, Takazumi

MR. FRANKLIN E. N. WARREN, Counsel for the  
Accused MATSUOKA, Yosuke

MR. GEORGE C. WILLIAMS, Counsel for the  
Accused HOSHINO, Naoki.

MR. OHARA, Shinichi, Counsel for the  
Accused OKAWA, Shumei

FOR THE DEFENSE SECTION (Continued):

MR. OKAMOTO, Toshio, Counsel for the  
Accused MINAMI, Jiro.

MR. SASAGAWA, Counsel for the Accused  
ITAGAKI, Seichiro.

MR. UCHIBA, Counsel for the Accused  
OSHIMA, Hiroshi.

FOR THE OFFICE OF THE GENERAL SECRETARY, IMTFE:

MR. CHARLES A. MANTZ, Clerk of the Court

MR. H. W. DELANEY, Deputy Clerk of the Court

The proceeding was begun at 1605.

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THE PRESIDENT: This is an application for subpoenas for witnesses residing in Tokyo who are to give evidence on the Manchurian phase.

Colonel Warren.

MR. WARREN: Now, your Honor, I have not, of course, talked to these witnesses personally. I am dependant on the Japanese counsel to do it.

THE PRESIDENT: I suppose you had better wait for the Court officials and the prosecution. I did not notice their absence.

The paper is 745.

MR. WARREN: Mr. Mattice's.

THE PRESIDENT: That is Mr. Mattice's application.

MR. MATTICE: 745, yes.

THE PRESIDENT: This application is for thirteen witnesses.

MR. MATTICE: That is a joint application, if your Honor please, of a number of --

THE PRESIDENT: It is made on behalf of the accused ITAGAKI, OKAWA, MINAMI, UMEZU, HOSHINO.

By the way, of course OKAWA is not on trial here, is he? His trial commences when he pleads, and he is not pleading. It is an odd situation.

MR. BROOKS: I think the Court in accepting evidence against him has entered an automatic plea

of not guilty in his behalf. That would be the practice I am accustomed to.

THE PRESIDENT: Of course, we would have to do that in the absence of any plea. It would be not guilty. However, we would take his plea, but we would deal with that case especially later; but I do mention the fact.

MR. BROOKS: The medical examination from the defense has been in for some time, your Honor, but I have not heard from the prosecution's examination.

THE PRESIDENT: No, I have not heard from the State side.

Were you present in Court, Colonel Warren, when I said I may take the liberty of directing that this evidence of these witnesses be given on affidavit and that copies of the affidavit be served in each case on the judges three days before the evidence is heard in Court?

MR. WARREN: I was informed of it, your Honor, but I had just left the Courtroom.

THE PRESIDENT: I recognize that as an immense departure. In no criminal case in a national court would it be possible; in fact, even in a civil case in court, you cannot insist on affidavit. At bottom it is a matter of agreement, but in Chambers, of course, it is different -- in specific cases in Chambers. However, the judges have discussed this

and I think they are prepared to consider something of the kind. I cannot commit them, in all events. We had a frightful experience today. Even the Japanese counsel cross-examining admitted that the witness was going about his answers in a most involved circumlocutory fashion. Our idea is to save time.

MR. BROOKS: Well, we considered that, your Honor, in the Document Section in taking affidavits, but due to the limited facilities that we had at the time, why, we had to do overtime in processing documents and let the affidavits be produced in Japanese. We do not have the facilities to put them in English -- at that time did not have -- and decided that Japanese attorneys should examine them. It would be much more expedient, however, if we could have that in English; but that is going to take a period of time and the mechanical facilities. That we do not have without a stoppage of the Court. Right at this time we broke down on documents.

THE PRESIDENT: Do these witnesses testify to the same matter? Is there any repetition?

MR. T. OKAMOTO: There will be no repetition, your Honor.

THE PRESIDENT: There is not?

MR. OKAMOTO: No repetition.

THE PRESIDENT: They all testify to different matters in the same phase.

The first witness will testify that the

Kwantung Army did not plan the Mukden Incident. The second will testify as to the nature of the Kyo-Wa-Kai, and the aims and activities of the new State. The third witness will testify that the attack by the Chinese Army was a surprise and the Japanese Army did not plan the incident. The fourth witness will testify as to reasons why the Kwantung Army was ordered to arms in Manchuria and their activity in North China and Inner Mongolia. The fifth witness will testify that the Kwantung Army did not carry out these operations with aggressive plans.

There seems to be some repetition there.

The sixth will testify as to the attitude of the War Ministry towards Manchukuo; the seventh as to the nature of the Manchukuoan administration; the eighth as to the Emperor Pu-Yi's position; and ninth as to the Japanese policy towards Manchukuo and the nature of the administration of the new State; the tenth as to the cause of the death of the Emperor's wife.

That does not seem to be a real issue.

Pu-Yi mentioned that, however, I recollect.

MR. BROOKS: It attacks his credibility.

THE PRESIDENT: The eleventh as to the credibility of Pu-Yi's testimony.

Well, you cannot call a witness to contradict



another witness, that is to say, to attack his credibility. You can call a witness, of course, to give a different version of facts in issue, but the purpose of calling that witness is to attack the credibility of Pu-Yi. Well, that evidence is inadmissible in an ordinary court.

The twelfth witness is to testify as to the attitude of the ~~ex~~-Emperor towards Japan; the thirteenth as to the facts relating to the allegation of killing of innocent population in Jehol.

There seems to be some repetition, but it is not very considerable. But, about that witness who was to attack the credibility of Pu-Yi, that is TAKAMURA.

MR. BLAKENEY: I could give your Honor some explanation about that to this effect: that the witness is a handwriting expert and will give expert opinion on the samples of handwriting the authenticity of which has already been made an issue.

THE PRESIDENT: Well, perhaps we cannot exclude evidence of that kind.

MR. BLAKENEY: I don't know who drafted the motion. It is drawn inartistically, but that is the purpose of the motion.

THE PRESIDENT: Mr. Carr, were you attacking the right to call in evidence of that type, that is, as to whether that handwriting on the fan is Pu-Yi's or not?



MR. COMYNS CAMER: Your Honor, it is not a very vital question, but as we called one, I find it a little difficult to object to their calling another if they like.

THE PRESIDENT: Well, I intend now to grant subpoenae in all thirteen cases on condition that the evidence is put in affidavit form and that the copies of the affidavits are served on the judges three days before the evidence is given in Court; but before I come to a decision, I would like to hear what counsel have to say. I do not think the defense will be prejudiced in any way.

MR. T. OKAMOTO: Your Honor, may I just speak a few words? May I just ask an exception for the witness now in this sitting, I mean for YAMAGUCHI and also KATAKURA who is now in Chambers waiting for the decision, because it is technically impossible to get affidavits ready and keep the proceedings uninterrupted.

THE PRESIDENT: Well, we may not have the same difficulty as we had today with those Japanese witnesses you mentioned. We, of course, want you to continue as best as you can, but these thirteen will not be required for several days, will they?

MR. T. OKAMOTO: I don't particularly want reservation for these thirteen witnesses, but these two witnesses: one was called today and the other, KATAKURA, a man who has been waiting this afternoon

for appearance.

THE PRESIDENT: Well, you can go ahead with them. Call them tomorrow. We will not require you to give their evidence in affidavit. There will not be time to do it.

MR. T. OKAMOTO: I would not be able to get the affidavit on such a short notice.

THE PRESIDENT: Well, I am speaking now of these thirteen. Are they among the thirteen?

MR. T. OKAMOTO: KATAKURA is not in this list.

MR. WARREN: No, they are not in that list, your Honor. It is the following two witnesses that we will have. Maybe we will have time on the others to do it.

THE PRESIDENT: What about those thirteen, Colonel Warren? Will you be ready with those? Are you prepared to put those in affidavit?

MR. T. OKAMOTO: By the way, one man who will be ready to be examined is KANAI. He was, I think, mentioned in that case, KANAI, Shoji. I did not draw up the list myself so I can't tell you the order.

MR. KATTICE: Number seven.

MR. T. OKAMOTO: Number seven. We intend to call him tomorrow or Monday, you see, so if you could give us an exception for KATAKURA and KANAI --

THE PRESIDENT: KANAI is to testify on the

nature of the Manchoukuoan administration.

MR. T. OKAMOTO: KATAKURA is not in that list. He is in addition to that.

THE PRESIDENT: Well, we make an exception of Number Seven then, KANAI.

MR. T. OKAMOTO: KANAI, thank you.

THE PRESIDENT: I would like to hear any objections the defense have to giving their evidence in affidavit in these cases. I do not want to shut out objections.

MR. CUNNINGHAM: Well, one of the things I would like to suggest is that it be confined strictly to Japanese witnesses who cannot speak English. Japanese witnesses who can speak English and whom the defense feel preferable to examine them in English should be permitted to testify in English. Other witnesses who can speak English and who are not troubled with the same difficulty we might have had today should be exempted from the rule and that the rule should be strictly construed, if it is going to be applied at all, because personally, I resent very much having to present evidence in affidavit form because I think that a witness is much more effective ordinarily by giving frank answers to specific questions than he is by bringing up his story in narrative form in a telltale manner in presenting it to the Court in stereotyped language perhaps; and I think from my personal standpoint it

is an imposition. I think it ought to be restricted as thoroughly as it possibly can be to only those situations where time is inevitably going to be wasted by adopting any other course.

THE PRESIDENT: Well, this is a case today, and we have not thought of it in connection with witnesses who are going to testify in English, but Japanese witnesses speaking in English may also exhibit the same tendency to speak in a roundabout way -- to answer in a roundabout way. I don't know. I have not noticed that tendency among Japanese who speak English.

For the time being we will limit it to Japanese witnesses who testify in Japanese and with great reluctance and regret because it is a distinct departure. We would like to have the advantage of the demeanor of the witness, but we will get it in cross-examination as well. You don't get much assistance from demeanor in examination in chief in any circumstances.

MR. CUNNINGHAM: While I am on the matter, I would suggest we be permitted the use of court reporters, if necessary, to take the testimony of these witnesses who will be reduced to affidavit because we certainly do not have the facilities to prepare their affidavit in that form.

THE PRESIDENT: We will invite the prosecution to give you every assistance possible.

MR. WARREN: Your Honor, I certainly don't want the prosecution to know three days in advance what our witness is liable to testify on. It takes any element of surprise out.

THE PRESIDENT: I am assuming they will make the services available and will not themselves do the work for you.

MR. LEVIN: I suppose Mr. Cunningham has reference to the court reporters rather than any members of the staff of the prosecution.

MR. WARREN: I don't think they have enough stenographers to help us.

THE PRESIDENT: They have enough to do as it is. It is outside their contract, I think.

MR. WARREN: You don't have enough stenographers do you?

MR. TAVENNER: We have lost a good many stenographers in the past ten days, about eight.

MR. ROBERTS: Is the purpose of the Court to use the affidavit instead of allowing the witness to testify?

THE PRESIDENT: I said what will happen in the Court is this. When we get copies of the affidavit, we will go through it and say, "This will come out. This will remain in." We will decide what is admissible without hearing argument, which is grossly objectionable, if it can be avoided; but we may go into Court and find you do not object to the

admission or deletion of these. If you do, it may be that to assure a fair trial we will have to hear you. I said that today.

MR. ROBERTS: Assuming there was something to add that was not in the affidavit that may be material along the same line, if you wouldn't desire to hear the witness it might be necessary to extend it slightly along that line.

THE PRESIDENT: There would be a result, I should think, that the person drawing the affidavit will say, "It is no good putting this in. This is obviously inadmissible. It is only wasting time. The Court will disallow it." On the other hand, he may be in doubt and may put it in and want to be heard on it. I don't see how we can refuse to hear him.

MR. COLE: Sir, the rule you stated, that calls for service only on the judges three days ahead of time, isn't that it?

THE PRESIDENT: I am saying three days just purely arbitrarily, Mr. Cole.

MR. COLE: I mean that it does not include service on the prosecution?

THE PRESIDENT: No, only on the judges.

MR. ROBERTS: Nor Japanese copies to be prepared here?

THE PRESIDENT: The position would not be changed in regard to the prosecution. It is only



the judges who want to know these and none of them require Japanese texts.

MR. TAVENNER: That does not change the rule, does it, however, as to the twenty-four hour rule of service?

THE PRESIDENT: This is the rule we are making: that you serve copies of the affidavit three days before on the judges, copies in English. It is not covered by any rule of Court. It is not supported by one. It is not contrary to one.

MR. WARREN: It does not mean that we will have to serve the prosecution twenty-four hours in advance?

THE PRESIDENT: Your responsibility to the prosecution is not affected.

MR. TAVENNER: Then if it is not affected, then under the present arrangement we are to have a copy of affidavits twenty-four hours in advance.

THE PRESIDENT: That stands.

MR. TAVENNER: Yes, sir.

MR. WARREN: But not this type.

MR. BLAKENLY: That entirely deprives us of having any opportunity to have a surprise witness in the case where we would not normally have prepared an affidavit.

THE PRESIDENT: Well, we will make this concession. If you have a surprise witness, you should have no obligation to disclose his evidence



beforehand. If there is any surprise witness here, I will exempt you on your undertaking of this one.

MR. LEVIN: Mr. President, that brings me to the point I had in mind. That would not preclude us in an exceptional case from making an application to you in Chambers to offer the evidence by question and answer rather than by affidavit if we deemed it essential for our purpose.

THE PRESIDENT: All we want is to get it in writing, Mr. Levin, and it can be done by question and answer or affidavit form.

MR. BROOKS: May I raise a question here? Suppose one of us calls a witness, gets the affidavit prepared, but that witness is called by only one man. Some other defendant may have some questions that he would like to bring out on direct examination. He does not know about this witness until he appears in Court. This has happened innumerable times.

THE PRESIDENT: We cannot prevent that. The obligation rests solely on the party calling the witness. That does not restrict the right of any other party, any other counsel.

MR. TAVLINER: Then, as I understand it, your Honor, the twenty-four hour rule as to service process will apply unless --

THE PRESIDENT: That is untouched.

MR. TAVLINER: Unless it is a matter of surprise and they get permission from the Court.

THE PRESIDENT: Well, we will not compel them to put on affidavit the evidence of a witness who they say is a surprise witness. We will have to take the word of counsel for that. We have no hesitation in taking it.

MR. WARREN: Your Honor, I think Mr. Tavenner means that witnesses we do not claim as surprise witnesses, that we must serve the prosecution with the affidavits twenty-four hours in advance. That is what he wants on all of our witnesses who are not surprise witnesses, that we serve the prosecution twenty-four hours in advance with their affidavit. That would be decidedly unfair.

MR. TAVENNER: That is right.

MR. COMYNS CARR: That is what we did with our affidavits.

MR. WARREN: They elected. We have not elected to do so.

THE PRESIDENT: You did that where you elected. Here you are saying should you be compelled to disclose the affidavit twenty-four hours in advance to the prosecution, it gives them an advantage which they should not have, which they would not get if you were allowed to call the evidence in Court for the first time.

MR. ROBERTS: That is one reason why we have been using witnesses without affidavits, in order to have that element of surprise.

THE PRESIDENT: For the time being I will exempt you from the obligation, subject to the approval of my brother judges, to give copies of such affidavits as you are required to furnish to the prosecution and, finally, confine the obligation to the judges.

MR. WARREN: Thank you.

MR. LEVIN: Mr. President, I think maybe we are not altogether understood. I had in mind not only submitting the evidence of the witness by question and answer in writing, but I wanted to be assured that we were not precluded from making an application to you in Chambers to take the evidence of a witness orally whom we deem not entirely a surprise witness but a witness whom we deem could give his evidence properly and not give it in a way that has been subject to criticism, and if we could make that assurance to you and feel that we could make that application. In other words, what I want to be sure of is that at least we are not precluded from making an application to you.

THE PRESIDENT: No, you are not, no. Really I am speaking about these thirteen witnesses.

MR. LEVIN: I was not talking specifically as to them.

THE PRESIDENT: Those thirteen -- that rule will be applied I think generally except in certain cases we are always prepared to hear you.

Is there any other matter?

MR. WARREN: Yes, your Honor. I had made informal application on some of these witnesses yesterday. I am not sure. Are they all included in this application which you have on this list, Mr. OKAMOTO? Do you know? I don't think they are.

Here is what I wanted to suggest, your Honor. Yesterday afternoon we asked if we might be able to subpoena all the witnesses on the Manchurian phase. Now these are a part of the witnesses which appear on the list I have before me. However, there are numerous other witnesses here and I have not had time to be able to prepare a formal application, but I do have the brief statement of what these men are expected to testify to and the reason we want to subpoena them, which is to be assured that they will be here and that they can have their transportation and matters of that kind. A voluntary witness can get up and walk off. There isn't anything we can do. But, if he is under order of the Tribunal, we can keep him here. So we will have altogether about thirty witnesses. I don't have these numbered.

MR. OKAMOTO: Better reconsider the matter because a question came up. It makes a great deal of difference. We may not be able to get one. You see, we must think it over.

MR. WARREN: Well, then, perhaps until I have a chance, in view of this new situation, to talk with counsel further on it, we will pass this question at this time.

THE PRESIDENT: I will hear you when you are ready, Colonel.

Anything else?

MR. BLAKENEY: I have a matter if your Honor can spare fifteen minutes. I will read this:

By your Honor's leave I should like to mention another matter which we of the defense consider of greatest importance. I venture to bring it up, unheralded, in chambers, by reason of its urgency and in the hope of sparing us all embarrassment.

I am authorized by the entire body of defense counsel to say that we are most apprehensive of an imminent breakdown of the presentation of the defense case. We have since the outset of our case been leading a hand-to-mouth existence in which the counsel currently engaged in court has accounted himself fortunate to have in hand a supply of documents to see him through a day or, at times, half a court day ahead. While the Tribunal has doubtless been aware of the existence of this condition, it has perhaps not realized that a result of it has been the omission of much evidence quite essential to giving the Tribunal a complete view of the case, which, however, simply could not be prepared in time for presentation. We have the liveliest fear that the day will come, and come soon, when we shall have to announce in open court that we are unable to proceed.

If I may be indulged for ten minutes I should like to give the details of this situation.

THE PRESIDENT: Before you proceed, Major Blakeney, I can assure you that the Court does not know of your plight in that regard. I have heard rumors, and other judges may have heard rumors, but we have not heard anything that has led us to meet and discuss the matter.

MR. BLAKENEY: Without reiterating what has often been suggested to the Tribunal, I point out that we have never had time to prepare the integrated presentation of a case. I venture to say that no one connected with this Tribunal has worked longer hours, day and night, for ten and a half months, than I; yet I am not ready with either my individual clients' cases or the parts of the general case assigned to my charge.

During the seven months of presentation of evidence by the prosecution we had to be in court during the working day; while we were willing to and did work at night and during week-ends, we had no administrative or physical facilities at those times. Not until the prosecution's case neared its end, moreover, could we in most instances know what proof we had to meet, and not until then could we intelligently plan our case. Thereafter we were granted three weeks recess, most of which was consumed with planning the general policy of defense and the painstaking study of the entire record en-



tailed thereby.

Now that the defense itself is in progress we are in some ways in even worse case. Most of us feel that, as the record now stands, we are compelled to be in court when evidence is being given, or risk being bound by every implication of we know not what casual, unpremeditated word of a witness. Those of us who nevertheless desert the courtroom in favor of the office find ourselves submerged under a multiplicity of problems, of procedural questions, of preparation of documents, of searching out and interviewing witnesses, of conferences to work out the questions of policy of the defense. The mere problems of cooperation between American and Japanese counsel, problems born of differences in language, in methods and in concepts, are most formidable. If failure of defense counsel to solve them is censurable, here is nevertheless a hard fact which cannot be ignored. Incidentally, none of these obstacles is rendered smaller by the fact that we have an average of two-thirds of a typist and secretary to each American counsel.

Our mechanical facilities are hopelessly overburdened. The difficulties of translation between Japanese and English have often been mentioned, and are daily -- let me say hourly -- illustrated in the Tribunal. Frequently, with all our efforts,

documents required from America or elsewhere arrive only on the eve of their introduction in evidence -- or long thereafter. I have personally worked until four o'clock in the morning translating documents which I required for the following day's presentation; the loyal and efficient staff of our translation and reproduction sections have worked long night hours, week-ends and holidays, although with knowledge that, often, regulations forbade their being paid for such overtime. Our "machinery" cannot longer bear the strain, nor can the humans who are concealed in that impersonal term.

Whether the defense are to blame for this condition is perhaps not material. The American defense counsel are as eager as any one to see this trial at an end. These lawyers want to return to the work which they have neglected for almost a year now, to their families and their homes. But they have one over-riding desire: to defend their clients to the utmost of their ability. We are compelled to the conclusion -- we are unanimous in this -- that in present circumstances it is impossible for us to discharge our duty of seeing that our clients receive a fair trial. Unless we can now be granted a recess of a week's time to reorganize the defense and to prepare evidence for the coming weeks, we shall, I fear, have to make the announcement in

open court - it may be tomorrow or Monday or the next week -- that we cannot continue. We now understand that there is the new virtual requirement that all testimony be reduced to writing in advance, which will of course entail much additional labor. And in candor I must say that we can give no promise that this application will be the last; we can promise only that a recess now will enable us to cope with the now existing crisis. Formal application will of course be made if your Honor directs, or we shall be happy otherwise to proceed as directed; but we felt that the situation was so desperate as to permit of no more delay in applying for relief.

THE PRESIDENT: Well, you say that unless we grant you a week you will breakdown and that we then will have to give it to you. Are you all of that opinion?

MR. BLAKENEY: That is our unanimous considered view, sir. And may I add one additional remark? For the sake of orderly procedure, for the sake of proper defense of the case, we should much rather get the recess without first breaking down.

THE PRESIDENT: You had one from the 3rd to the 17th of February.

MR. LEVIN: From the 3rd to the 24th.

MR. BLAKENEY: Three weeks.

MR. WARREN: Your Honor, I would like to make an observation on that. I am the chairman of the American counsel for the present phase. We are getting documents that will be introduced in evidence the following day. We have known of the existence of the document, but it has been in Japanese, and in order to read that document we have had to stay up and work every night in order to be prepared; and as Mr. Blakeney said, this morning I was absolutely desperate. I didn't know whether we could go through the day or not.

I know there are certain documents in there that must be weeded out; that is, in my opinion they must be weeded out, because it would only antagonize the Tribunal if they were to come up. But that is the way we have them at the present time and we cannot give them consideration, the consideration they should have. In the meantime, the only alternative we have is to call one of our live witnesses and place him on the witness stand in the hope that we can catch up, which we have been trying to do today.

If we go three days we will be exceedingly fortunate. The first day of our phase taxed our facilities to the utmost up to within a period of three days before the second phase of our case come on. Now document after document that we are expect-

ing are in the process of being somewhere in our Language Section. On the next sub-division of this phase the documents that we want and the list of documents that we will need that are necessary -- out of the entire amount four are ready for distribution. It isn't anybody's fault. We have worked against the deadline steadily, and those of us who have to do these things don't mind working overtime if we can put it in, but it is going to be humanly impossible to keep up under the strain that we are going under.

The mechanical end of the thing itself, of the list of documents and of the things we have to go through, amounts to a staggering quantity of work a day. It does not tax your brain power, but it is a question of getting your mechanics cleared through: our order of proof, our running commentaries and being certain that documents are delivered to the proper places; checking the documents to be sure we have a proper document that we want; and then analysis of the document and attempting to fit it into the overall scheme as to generally be pretty certain it fits. But many times it does not.

I actually believe a recess will save time. When I made the application for time before, if your Honor remembers, I asked for additional time and the Court cut it. We needed it and need it

desperately. Now we are faced with the proposition where we might have to walk in and say, "We cannot proceed."

THE PRESIDENT: Do you think you can carry on until the middle of next week?

MR. WARREN: It is doubtful. We will do the best we can. I won't say we can't, your Honor; it all depends on the witnesses. It depends on the length of time the witnesses are on the stand and the rest of the documents on the first phase here. I haven't had a chance to go over them yet with Japanese counsel to determine the advisability of using them or not in some instances. When we get to the weeding out process we may weed out a great many, more than we anticipate we will have to; so we don't know how long we can go. And then when we come to the Tribunal, of course there is going to be a number of documents excluded by the Tribunal, even though we think they should not be, and that can shorten the time if it is a document intended to be read. So I wouldn't say we can go that far; and of course if we break down it means that everybody in front of us breaks down, because we are taxing the machinery to the utmost at the present time.

THE PRESIDENT: What have you to say, Mr. Tavenner?



MR. TAVENNER: Well, sir, it isn't a new story to hear about meeting deadlines, and as far as being of any help to them is concerned, we are anxious to do anything we can. We have never promised stenographers from the beginning; we can't do so now. It is easier for them to employ new stenographers than it is for us to get added ones increased to our personnel set-up. But as far as processessing documents is concerned, we have done everything that has been asked of us.

MR. BLAKENEY: That is right; we make no complaint whatever.

MR. TAVENNER: We can do some more translation work now. Only sixty documents have been turned over to us for translation, and they can take a considerable number more than that at this time if they are handed over to us. As to processing, it is something well over five hundred documents that we have processed.

Of course we want to do everything we can to prevent a continuance, because we think that is harmful, but recognize that after having done everything we can and they are in a position where they can't go ahead with justice to their clients, we would not want under those circumstances to insist on too much.

MR. BLAKENEY: I want to say we have made



the most sincere effort to avoid making such an application. We have no desire to make such an application. We have attempted by every means in our power to be ready to continue by the time heretofore granted. We would not do this except as a last resort, your Honor.

THE PRESIDENT: How long will it take you to get through these phases? Have you formed any conclusions as a body?

MR. BLAKENEY: I am afraid we have not. I think we can say this: It will be much nearer to half the time consumed by the prosecution than it will to the entire time consumed by the prosecution.

THE PRESIDENT: How much?

MR. BLAKENEY: The entire case. That is my personal estimate only. It is not a promise.

THE PRESIDENT: They took nine months, didn't they?

MR. LEVIN: The presentation of their testimony was eight months. You will recall, Mr. President, that when we made our original application it was for one month, or thirty days. When that was made it was made really as a minimum of time that we required. We have had three weeks to date. Certainly an additional week would be entirely in keeping with our original idea of what

was the minimum.

MR. WARREN: We were in a situation where we had no backlog of documents and no way of building up a backlog from which to draw.

MR. BLAKENEY: When I was presenting evidence in court I had documents handed to me five minutes before I was going to introduce them.

MR. COMYNS CARR: Your Honor. I would like to make one observation, not in a hostile spirit but very much the reverse.

In the first place, with regard to our translation facilities, I think we can safely assure the defense that if they hand over to our translation staff a document to be translated, that will not leak through to the attorneys conducting the case before the Tribunal. They can rely upon me, if I may say so, distinguished people we have in that translation staff to play fair with them in that respect.

MR. BLAKENEY: Excuse me for interrupting, but the exact contrary situation was stated at the time the use of your translation facilities were offered, was it not?

MR. TAVENNER: Yes, I distinctly stated I did not want our staff being put in the position of seeing a thing and at the same time not seeing it, and I suggested that they give to us all their

documents other than documents they didn't want us to see and we would process them, and they would do the documents that they considered were of some secret character to them. I thought that would work out much better, because it is an embarrassing thing.

MR. BLAKENEY: In any event, I don't want this Tribunal to understand that this application is being made solely on the basis of a breakdown of mechanical facilities. It is not solely that by any means, as I attempted to point out. It is partly a breakdown of defense counsel. It is a breakdown of cooperation between people speaking different languages. The mechanical aspect of it is only one.

MR. WARREN: It takes so much longer to carry on a conversation with our Japanese counsel through our interpreters that it is time-consuming.

MR. BLAKENEY: I have stomach ulcers from it.

MR. WARREN: That is the absolute truth in its development, and we often work late at night. I even come down to the hotel and work late at night and the result of it, while we accomplish a great deal, still, if we were working with lawyers who talked our language we would accomplish more in five hours where we now spend twelve to fifteen; and then, of course, they don't understand our system and we

don't understand theirs.

MR. BLAKENEY: Or if we had lawyers who knew our system.

MR. WARREN: There are very many of those questions that come up, and it slows us down tremendously in a discussion of an involved document. It sometimes takes literally hours. They have to explain their position to us, why they want it in, and we explain to them why it would not be in keeping with the method of procedure we have to follow. But ultimately we arrive at a satisfactory conclusion.

MR. COMYNS CARR: Your Honor, the other observation I intended to make-- I am sorry I didn't know about the first one -- the other observation I intended to make was really directed to that particular point. We found in the course of preparing our case, by experience, that there is, of course, a very great difficulty in finding out in advance whether a document which is in Japanese is worth processing or whether it is not, and in the early days we did what I rather suspect the defense had to do also, have it all translated and then see about it; and we had a great many documents processed which, in the beginning of our case, when they had been done and further examined turned out to be not worth using.

I don't want to criticize, but I can't help thinking in fact that a great deal of the facilities available to the defense have been up to now imperfectly used by the production of very long documents, which, when tendered, have been rejected by the Court, and which if the defense had seen them in English before at an earlier date than they were able to, they wouldn't have had translated at all. What we found was the only remedy for that was to have, before issuing an instruction to process a document, a fairly thorough scanning, so that one could fairly make up one's mind whether the document was worth using or not; and although it may seem to involve delay, means a very large saving of time and trouble in the end.

I would like to offer the suggestion -- to put it the other way -- that the processing facilities have been wasted in producing a document of forty pages which has then been rejected. I think the explanation that is probable is what I have been suggesting, and I would like to offer the suggestion of the method we found to avoid that difficulty.

THE PRESIDENT: You found it much easier to come to an agreement among your limited number than they would among theirs.

MR. COMYNS CARR: I appreciate that, but

still you can't express an opinion about it until you know sufficiently what is in the document to form that opinion.

MR. BLAKENEY: Our trouble is that Mr. Cunningham scans a document for the defendant OSHIMA only, I scan for the defendant TOGO. We cannot centralize it. We try to do that, but there you meet the inherent difference between the prosecution and the defense.

MR. BROOKS: We had a committee that I worked on every night for at least three months, a documents committee, scanning documents, but we could only work on it at night. We didn't have seven or eight months before we started trial to work these problems out like you gentlemen had, and that is one answer to it.

Now, the problem is this: We have a committee, and with those of us who get in there, the five men trying to represent army and navy and politicians and civilians, and so forth, it was often hard to pass on a document where it involved some man who wasn't there, because we didn't know whether he would want it. It was one of the slowest processes. We went over several thousand documents, and out of that several thousand we selected only a few hundred, but we still can't get those processed.

MR. COMYNS CARR: I am not criticizing;



I only wanted to be of what assistance I could.

MR. BROOKS: I appreciate that.

MR. WARREN: As a matter of fact, in many instances we have done exactly what you have suggested. I even get a crude translation of a document sent up to me and I try to check that document before I send it to the documents committee, but so very often some counsel will send it through. As a matter of fact, we have had a wastage of time, of course, but I don't think to an excess. We discussed ways and means to date to even cut that down further by putting a strict limitation upon the presentation of documents to our processing units by counsel before they are thoroughly scanned.

MR. BROOKS: We have about five men approving a document now before it can be processed.

THE PRESIDENT (to the reporter): How long will it take to get this record out?

(The reporter replied between five and six hours.)

We may need this for tomorrow afternoon for the recess. I would like to have the Judges have that before us. There are eleven of them and it is impossible to tell eleven what happened if you get them in conference.

(Whereupon, at 1700 hours the proceedings were concluded.)